IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

JAMES G. JAMES, APPELLANT,

v.

GEORGE H. APPEL, APPELLEE.

No. 108.

BRIEF OF APPELLEE.

The specifications of error in the appellant's brief vary very materially from his assignment of errors filed in the Supreme Court of the Territory of Arizona, and we submit that any errors not assigned in the court below are waived and should not be considered on this appeal. The only specification of error in the brief which was assigned below is the fifth, which corresponds to the third error assigned below. The sixth specification in the brief has a material variance from the second error assigned in the Arizona court, the latter referring to an alleged provision of the organic act of Arizona that "A jurisdiction of the courts shall be as limited by law," while the provision, as set out in the sixth specification in the brief is that: "The jurisdiction * * * shall be

limited by law." The first four specifications of error in the brief are not based upon anything in the assignment of errors filed below. However, to enable the court, should it see fit to review all of the specifications of error in the brief, we will take them up in their order.

Statement of Facts.

The statement of facts embodied in the appellant's brief contains several misstatements, no doubt unintentionally, which we feel obliged to correct. For instance, on page two of the brief, he states: "This motion (the motion for a new trial) was called for hearing on the 30th day of March, 1900, which was the day before the last day of the term at which the motion was made and the judgment rendered, and was on that day continued for hearing by order of the court until the next term of the court." The motion was not called for hearing on the 30th day of March, nor on any other day of that term, nor was any hearing had of the motion at that term, nor did appellee or his counsel have any notice or knowledge of the continuance until after the end of the term, as we shall show more fully later. Relying upon the statement of facts certified by ex-Chief Justice Street and by Chief Justice Kent, of which we have a copy before us, we also submit that appellant is in error in stating that the motion "was on that day continued for hearing by the order of the *court*." Paragraph four of the statement of facts by the Chief Justices shows that the order was made "by the Honorable Webster Street, Chief Justice of the Supreme Court of the Territory, and Judge presiding, etc.," "by chamber order entered of minutes," so that the order of continuance was made, not by the court, but by the judge in chambers. And that judge was not

the judge of the district court in which the case was tried but was the judge of a different district who had been called in to try this case during the absence of the presiding judge of the court in which the case was tried (Judge Davis).

Appellant's statement of facts continues: "At each succeeding term, the motion was called for hearing and at each term it was so called it was on each occasion continued until the next term, the judge assigning as a reason for the continuance 'that the Honorable Webster Street, etc.'" The impression given by this statement is that the reason quoted was assigned for the first continuance, but that is not true, no reason whatever having been assigned for the first continuance.

The statement on page five of the brief as to the points that were and were not made in the territorial court by appellee is incorrect. The theory of the appellee in the Supreme Court of Arizona was the same as that which will hereafter appear in this brief, except that as no question was raised in the Arizona court as to the validity of the Arizona statutes involved, the appellee, of course, made no argument on that point.

The statement on page seven of appellant's brief that "Paragraph 842 of this chapter also grants the right of appeal to the Supreme Court of the Territory from an order denying the motion for a new trial," is incorrect. There is no right of appeal under the laws of Arizona from an order denying a new trial, the only appeal being from a final judgment; although, on such appeal from the final judgment, the court is required by paragraph 842 to review the ruling on the motion for a new trial.

Spicer *v.* Simms, 57 Pac. 610.

Appellant makes a similar error at the top of page eight of his brief in stating that the amendment of 1891 gives

a right of appeal. That amendment only gives a right to have the questions raised by the motion for a new trial *reviewed* on appeal from final *judgment*.

I.

Paragraph 837 of the Revised Statutes of Arizona (1887) is Mandatory and not Directory.

The appellant's quotations from text-books as to the rule for construing statutes specifying the time within which a public officer is to perform an official act are of little value in interpreting this statute. While, of course, within the broadest meaning of the term "public officer," a judge is such an officer, yet a court is not, and an examination of the authorities cited will show that they had in mind officers who were performing ministerial duties and not tribunals exercising judicial functions. Of the cases quoted by appellant, *Rawson* v. *Parsons* (6 Mich. 400) and *Broad* v. *Murray* (44 Cal. 228), construe statutes requiring the decision or judgment in a cause to be rendered within a particular time and hold such statutes to be directory. Such a construction of such statutes was, of course, absolutely necessary in order to prevent a denial of a litigant's right to a determination of his suit, to hold otherwise would result in leaving many cases pending in court and undecided indefinitely, or result in their dismissal without default of plaintiff. The same is true as to *People* v. *Doe* (1 Mich. 451).

Gomer v. *Chaffe* (5 Colo. 383), while more like the case under consideration, turned upon another provision of the code requiring "the judge, upon granting or refusing a new trial, to state in writing the grounds upon which the same is granted or refused." This other section of the

Code convinced the court that section 201, requiring motions for new trials to be decided in the same term in which the judgment was rendered, was not mandatory but directory. Arizona has no such statute requiring the grounds of granting or refusing a new trial to be stated in writing, or stated at all, so that the reason for the Colorado decision does not exist in Arizona. *Aspen Co.* v. *Billings* (150 U. S. 31) and *Pearce* v. *Strickler* (49 Pac. 727) involve the construction, not of a statute, but of a rule of court, to which very different principles must be applied. A court may adopt rules to govern its proceedings with discretionary power to deviate from them where their application would be injurious or impracticable.

Grayson *v.* Virginia, 3 Dall. 321.

"And it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it."

U. S. *v.* Breitling, 20 How. 252.

In the New Mexico case the rule of court bore no resemblance to the statute in question here, as it provided that the court might expressly continue the motion. We are of the opinion that it is not within the power of courts to accomplish by rule what, as we expect to show under a different assignment of error, has been done by this statute. The legislature has an undoubted authority to limit by law the times within which courts shall have jurisdiction to do particular things, but a court cannot enlarge or restrict its own jurisdiction or the jurisdiction of inferior courts by the adoption of a rule.

18 Enc. P. & P. 1241.

In *Hudson* v. *Parker* (156 U. S. 277) it was said:

"This court cannot, indeed, by rule enlarge or restrict its own inherent jurisdiction and powers or those of the

other courts of the United States, or of a justice or judge, or either, under the Constitution and laws of the United States."

And, in the same case, it was explained that the statutory power of this court to make rules was "for the orderly conducting of business" in all the courts of the United States, and to "prescribe the form of writs and other process." The power of this court in making rules for the district and circuit courts would probably not extend to depriving them of jurisdiction to grant a new trial, for instance, if such jurisdiction existed by law. Moreover, the court, in *Aspen Co.* v. *Billings*, followed the opinion of Mr. Chief Justice Field in *Giant Powder Co.* v. *Cal. V. P. Co.* (6 Sawy. 508), that "Equity Rule 88 applies only where no petition is presented during the term." That alone shows that the construction of Rule 88 can have no bearing on the construction of this Arizona statute, which has no application except where the motion is presented during the term.

The long list of cases beginning with *People v. Cook*, which appellant cites (pages 13 and 14 of his brief), without quotation, explanation or comment, requires no comment from us, except that none of them have any application.

The passage quoted from 14 Enc. P. & P. 902 is based upon the single case of *Gomer v. Chaffe*, which we have already considered. On the same page of the same volume of this Encyclopædia, appears the following:

"Abandonment.—Failure to obtain ruling in time.—If the motion is not disposed of during the statutory time, it will be regarded as denied or overruled."

The same volume of the same work, on page 897, says:

"A motion for a new trial may be continued to succeeding terms like other motions or proceedings, UNLESS THE STATUTE REQUIRES SAID MOTION TO BE HEARD DURING THE TRIAL TERM."

To support the proviso which we have put in capitals, the Encyclopædia cites in the notes, besides the Texas cases hereinafter referred to:

Vallentine *v.* Holland, 40 Ark. 338.
Walker *v.* Jefferson, 5 Ark. 23.
Doddridge *v.* Gaines, 1 MacArthur (D. C.) 335.
England *v.* Duckworth, 74 N. Car. 309.
Kane *v.* Burrus, 2 Smed. & M. (Miss.) 313.

In the cases of *Larson* v. *Ross* (56 Minn. 74) and *Gribble* v. *Livermore* (64 Minn. 296), the statute under consideration is not quoted, and both cases are decided upon the ground that the party opposing the motion appeared at the subsequent term and argued the motion on its merits, without first objecting to the appeal, and thereby waived the objection. In the latter case the court added:

"Whether the objection would be well taken if made in the court below, we need not consider."

To determine the true construction of Section 837, it is necessary to consider its history. At the time of the adoption of the Revised Statutes of Arizona in 1887, the majority of the bar of the Territory, as well as its Code Commission, were Texas lawyers, and were familiar with the Texas practice and with the interpretation which had been given it by the Texas courts. The Commission which prepared the Code of 1887, adopted the Texas practice act with almost no variation and, among other provisions, adopted from Texas this Section 837 that: "All motions for new trials in arrest of judgment or to set aside

a judgment shall be determined at the term of the court at which the motion shall be made." This section is the same, word for word, as Article 766 of Hart's Digest of the Texas Code. The effect of the paragraph had been determined by the Supreme Court as early as 1852 in *McKean* v. *Ziller* (9 Tex. 59) which was a case absolutely on all fours with the case at bar. The court said:

"It is insisted that the statute is but directory, and that it was within the power of the court to postpone to the next term and then act upon the motion for a new trial. We cannot so regard it. We think the mandate of the law is peremptory and must be obeyed; and that at the end of the term the motion, not having been acted on, was discharged by operation of law.

"The suspending of the judgment was consequent upon the continuance of the motion. The one was but incidental to, and was dependent upon, the other. But the judge, not having the legal authority to continue the motion, the order for that purpose, and that made dependent upon it, were alike void.

"It is true that the court has control over and, for good cause, may alter or vacate its judgments during the term; but, in this case, the court did not set aside or vacate the judgment during the term. It could do so afterwards only by an original proceeding, instituted for that purpose, setting forth equitable grounds sufficient to entitle the party to a rehearing." (*Goss* v. *McClaran*, 8 Tex. R.)

In 1853 a similar decision was made in *Bullock* v. *Ballew* (9 Tex. 498), and in 1855 in *Laird* v. *State* (15 Tex. 317). In 1873, in *Bass* v. *Hays* (38 Tex. 129), the court cites *McKean* v. *Ziller*, and says: "This decision has been followed by this court without a known exception, and must now be considered as the established law of the State." In *Wilcox* v. *State* (31 Tex. 587) the same rule was applied to criminal cases. After the adoption of the

Arizona code, the same rule has been laid down in Texas in *Carter* v. *Commissioners* (12 S. W. 985) and in many later cases.

The statute having been adopted from Texas, it was adopted with the interpretation which had been given to it by the courts of Texas, and even if this court should be disposed to consider that interpretation wrong, looking at it as a case of first impression, it will, under these circumstances, be bound by the Texas decisions. The object of construction and interpretation is to ascertain the intent of the legislature, and there can be no doubt that, by Section 837, the Arizona legislature meant what the Texas courts had held for thirty-five years to be the meaning of the language adopted. In adopting and enacting a foreign statute decisions expounding it are adopted with it.

Tucker *v.* Oxley, 5 Cranch. 42.
Pennock *v.* Dialogue, 2 Pet. 18.
Cathcart *v.* Robinson, 5 Pet. 280.
McDonald *v.* Hovey, 110 U. S. 628.
Brown *v.* Walker, 161 U. S. 600.
Henrietta Mining Co. *v.* Gardner, 173 U. S. 130.

The case last cited is one involving the construction of an Arizona statute adopted from the State of California, and the court says:

"The language of paragraph 40, as amended in 1891, having been taken from the California code, it is presumed that it was taken with the meaning it had there."

Constrained by the Texas decisions, as well as by its own interpretation of the law, the Supreme Court of Arizona, in *Ruff* v. *Hand* (24 Pac. 257), held as follows:

"Paragraph 837, Rev. St. 1887, requires that a motion for a new trial shall be determined at the term when the motion is made. The requirement of the statute is mandatory. If a motion for a new trial be not acted upon during the term, it is discharged at the end of the term by operation of law. McKean *v.* Ziller, 9 Tex. 58. The remedy, in such a case, is to apply to the court for action upon the motion before the end of the term. Laird *v.* State, 15 Tex. 317. The notice of appeal must be made during the term, and the bond on appeal must be filed within 20 days after the term at which the final judgment is entered. These requirements must be strictly complied with to give this court jurisdiction."

We are profoundly convinced that, independent of any construction by the courts of Texas, the decision in *Ruff* v. *Hand* and in this case gives a correct interpretation to Section 837. There must be no comparison between this statute and statutes requiring judgments to be entered within a particular time, because the latter, if mandatory, would tend to defeat and delay justice, because it would sometimes be impossible to decide cases on due consideration within the time, and no judgment could be rendered at all. But the effect of a mandatory construction of paragraph 837 is quite the contrary. Before paragraph 837 can take effect a judgment must already have been rendered, and its effect is to make that judgment final and put an end to the litigation, surely a beneficial result. The effect of our interpretation is that at the end of the term in which the judgment is rendered the trial court loses control and jurisdiction over the judgment, except upon a direct proceeding brought for the purpose of attacking, but, although an end is thus put to the litigation in the trial court, the defeated party is not thereby concluded. He can still obtain a review by an appeal to the supreme court. It is not conducive, either to justice

or to the settlement of estates and controversies, that a trial court should have the power to prolong indefinitely the question whether its own judgment should be set aside or not.

II.

We are not disposed to dispute the statement which appellant places in capitals at the head of the argument under his second specification of error on page fifteen of his brief, which is as follows:

"Paragraph 842 of the Rev. St. of Arizona does not of itself purport to render a judgment denying a motion for a new trial at the expiration of the term at which the motion is made."

In the first place, the denial of a new trial is an order and not a judgment, although appellant's counsel, by his constant repetition of the word "judgment" in that connection, seems to endeavor to accustom our minds to that novel idea. But, of course, paragraph 842, as amended in 1891, does not purport to render a judgment or make an order of any kind. Such is not the province of a law. What it does do is to provide that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed" then the lapse of the term shall *ipso facto* result in the denial of the motion.

The construction which appellant contends for results in an utter absurdity. He says, on page sixteen of his brief:

"The paragraph merely directs that under certain circumstances a certain order shall be made by the court, viz: Upon no ruling being made upon the motion for a new trial at the term at which the same is made, then said motion shall be denied by the court."

But a denial by the court is a ruling, and counsel's contention amounts to this: That upon no ruling being made a ruling shall be made. As the time referred to by the word "then" is at the end of the term, it would be impossible for the court to determine whether the conditions upon which he was to deny the motion existed until after his power to deny was gone.

A further absurdity is involved in this. Paragraph 842, as amended, goes on to say: "All questions that may have been raised thereby shall be subject to review by the supreme court AS IF SAID MOTION HAD BEEN OVERRULED," meaning that the denial effected by the lapse of the term should have the same effect as an overruling in term by the court. But, if we adopt the construction which appellant attempts to force upon the statute, that is, that it is a direction to the court to deny the motion, the clause we are now considering would have no meaning, for it would be equivalent to saying that the court should overrule the motion, and then all questions should be subject to review, etc., as if said motion had been overruled.

The argument that the supreme court of the Territory could not review the order denying a new trial under our theory because it would be a "legislative judgment" is based upon the unwarranted theory that such denial would be a "legislative judgment." The dilemma which the appellant thinks he finds is the product of his own ingenious manufacture, and at once disappears upon a clear view of the statute and its effect. The amendment of 1891 does not attempt to give a right of appeal from the motion for a new trial as the appellant supposes, but only provides that "ALL QUESTIONS THAT MAY HAVE BEEN RAISED THEREBY SHALL BE SUBJECT TO REVIEW BY THE SUPREME COURT AS IF SAID MOTION HAD BEEN OVERRULED," etc. "If said motion had been overruled," there could be no ap-

peal from an order overruling. The only appeal is from the final judgment which had been rendered before the motion for a new trial was even filed, but on that appeal from the final judgment the supreme court is given jurisdiction to review "all questions that may have been raised" by the motion for a new trial. The law of Arizona on this subject is fully and clearly explained by the Supreme Court of Arizona in *Spicer* v. *Simms, supra.*

But the Act of 1891, amending paragraph 842, was not necessary to justify the court's action in dismissing the appeal, which must have been the same even if that Act had not been passed. The Act of 1891 was passed after the decision of *Ruff* v. *Hand*, and was passed because of that decision. It was not intended as an additional restriction upon the granting of new trials, but was intended rather for the benefit of the party seeking a new trial. Under the law as it stood before 1891, the lapse of the term without a ruling on the motion amounts to an abandonment of the motion, so that the issues raised thereby could not be passed upon by the appellate court. It was to remove the only hardship caused by the law, as it thus stood, that the Act of 1891 provided that such lapse of the term should be equivalent to a denial of the motion, thus giving the defeated party the right to a review by the supreme court of all questions raised by his motion. In addition to that effect of the Act of 1891, however, it does recognize and confirm the construction put upon paragraph 837 by the courts of Texas and Arizona.

III.

The present counsel for appellant is (we hope) misinformed as to the facts which he attempts to set out in his third specification of error. The first continuance of the

motion for a new trial was made without the knowledge of appellee or his counsel, and at the urgent solicitation of counsel for the appellant. Mr. Chief Justice Street, who made the order, informed appellant's counsel at the time that he made it that he did not believe he had the authority or power to continue the motion, but that, if appellant insisted, he would make it in order that the question might be brought before the Supreme Court of Arizona, and gave appellant's counsel distinctly to understand that he was taking the continuance at his peril. The appellee and his counsel did not discover that the first continuance had been made until some weeks after the end of the term and, as soon as they learned of it, protested against it. The third order was made while Mr. Hazzard, one of appellee's attorneys, chanced to be present in court, and he then and there objected and protested. To all the objections and protests of appellee's counsel, Mr. Justice Davis replied that he was not passing upon the legality of the orders, but made them solely at the request of Judge Street. The entire program of continual continuances was a part of the consistent policy of the defendant below to delay the execution of the judgment. That delay was the only purpose of the defendant in procuring the continuances became evident when, after a delay of nearly two years, Mr. Chief Justice Street came from Phoenix to Tucson to decide the motion. The motion for a new trial was then submitted to the court without argument or suggestion on the part of appellant or his attorneys, and no argument was ever made before the trial court upon the merits of the motion for a new trial. Counsel for appellee did not argue the merits because they took the position that the trial court had no jurisdiction of the motion; but they did argue their motion to vacate the orders of continuance, and Mr. Chief Justice

Street stated from the bench that he had made the orders at request of appellant's counsel and at appellant's peril, and declined to express any opinion on the arguments advanced by counsel for the appellee on the motion to vacate the orders of continuance, saying that whatever might be his own opinion of the questions of jurisdiction he would deny the motion for a new trial and let the supreme court pass upon the questions. That Mr. Justice Davis's attitude in making the orders of continuance at the request of Mr. Chief Justice Street was as we have stated is proven by the fact that he concurred in the dismissal of the appeal by the supreme court. The present attempt of appellant to assume the position that the continuances were made by the court of its own motion and without laches on the appellant's part is outrageous. For the reasons we have stated, the maxim "*Actus curiæ neminem gravabit*" is very far from being applicable to this case.

IV.

We cannot believe that the argument made under this specification of error will be taken seriously. Because the power to grant a continuance is an "inherent power," it seems to be contended that a statute must not be construed as prescribing any limitation as to the conditions, time, or manner for the exercise of that power. When courts and text-books say that the power to grant continuances is inherent they mean that express statutory authority for granting them is not necessary, not that the power cannot be limited by express enactment. All of the authorities cited by appellant are dealing with the question of continuance of the trial of a cause which is still pending in court, not with the continuance of a motion for new trial filed after judgment has been rendered,

though we have no doubt that in the absence of statutory limitation, a court could, without express statutory authority, continue a motion for a new trial.

The point here involved, however, is conclusively determined by the decisions in *McKean* v. *Ziller* and *Bullock* v. *Ballew*, cited above, both of which were decided by the Supreme Court of Texas before the adoption of the Texas statute by Arizona, and in both of which continuance for the term was ordered precisely as in this case.

V.

The proposition that the legislature of Arizona cannot exercise the judicial powers which have been vested in the courts will not be disputed by us, but we deny that either paragraph 837 or paragraph 842, as amended in 1891, is open to that objection. As we have pointed out before, counsel is confused by his misapprehension of the meaning and effect of paragraph 842. It is not true that that section, as he supposes (page 33 of brief) "of itself operates to deny a motion for a new trial while the same is pending before the court." What it does is to provide that the lapse of the term shall operate to deny the motion. Neither is it true, as assumed on the same page of appellant's brief, that "according to the statutes this legislative order is an appealable order," nor that "an appeal may be taken therefrom to the supreme court of the Territory." No appeal is given from the order, and it has never been supposed, in Arizona, that the order is appealable. As we have already pointed out and as is decided in *Spicer* v. *Simms*, *supra*, no appeal could be taken at that time nor at any time before the adoption of the Revised Statutes of 1901 from anything except the final judgment of the court. But, if such appeal were taken from the final

judgment, then the Act of 1891 required the supreme court to review not the order denying a new trial, but "all questions that may have been raised thereby."

The cases cited by appellant in this specification of error have not the slightest tendency to sustain his position, and the passages quoted from them clearly determine the question in our favor. For instance, nothing could prove more clearly that the laws in question were proper legislative enactments and not judicial than the following quotation from Justice Field in the Sinking Fund case:

"The distinction between a judicial and legislative act is well defined. The one determines what the law is and what the rights of parties are with reference to transactions already had, the other prescribes what the law shall be in future cases arising under it."

These laws, passed in 1887 and in 1891, "prescribed what the law should be" in this case, which arose under it in March, 1900. Nor could anything be stronger in our favor than this, quoted by appellant from *Young* v. *State Bank* (4 Ind. 301):

"The granting of a new trial is a judicial act, and in this State controlled by settled rules of law. If an inferior court should in any given case exercise the power to grant new trials, in violation of these settled rules, this court would set aside the grant, and leave the judgment rendered unaffected."

A law, as distinguished from a sentence, judgment, or decree, "establishes rules that shall regulate and govern in the matters or transactions occurring subsequent to the legislative action."

6 A. & E. Ency. P. & P. (2d Ed.) 1032.

The constitutionality of a statute providing that a judg-

ment shall be entered in certain cases has been expressly decided in Wyoming. In *Barkwell* v. *Chatterton* (33 Pac. Wyo. 940) a statute provided that:

"The change of venue shall be deemed abandoned unless the applicant shall, within the ten days, &c., * * * if the abandonment is by the plaintiff, the cause shall be considered discontinued and the costs taxed against the said plaintiff and a judgment therefor rendered; and if the abandonment is by the defendant, he shall be adjudged in default."

That statute was assailed by the plaintiff as unconstitutional in being "an assumption of judicial power by the legislature." The counsel for plaintiff contended—

"If the legislature can direct a certain judgment to be rendered in this case, it may exercise that prerogative in all cases; and the courts then will perform merely perfunctory duties as an agency of the legislative department,"

to which the court replied:

"As to this, it is only necessary to say that the law in question is a general law, and that it was passed a long time before this controversy arose."

Surely it is not an encroachment on the judicial power to provide that litigation must at some time have an end. After a judgment has been rendered upon a full hearing, it could hardly be considered an encroachment upon the judicial power if the trial court were denied altogether the right to change its decision.

"A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital.

Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect. It not infrequently happens in this, as in all other courts, that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearings or motions for a new trial. Will anyone seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party having been fully heard once upon the merits of his case is deprived of the constitutional protection because he is not heard a second time?"

Railway Company *v.* Backus (154 U. S. 421).

All of the authorities and arguments in this assignment of error that have any application at all apply only to paragraph 842, and have no application to paragraph 837, for the latter does not purport to deny a motion, nor have that effect, nor, under it, does the lapse of the term have that effect. Under all of the decisions, both of Texas and Arizona, the effect of paragraph 837 was that, on the expiration of the term, the motion "was discharged by operation of law." Although the Act of 1891, amending paragraph 842, did clearly confirm and sanction the decision in *Ruff* v. *Hand*, yet its main purpose was to make it possible to have the questions raised by the motion for a new trial reviewed on the appeal where the appellant was unable to secure a ruling on his motion before the expiration of the term. If the amendment to paragraph 842 is void, paragraph 837 still stands and justifies the dismissal of the appeal. That being true, it is immaterial whether the Act of 1891 is void or not, and for that reason this court will not determine whether it is void or not. As was said in *Wayman* v. *Southard* (10 Wheat. 46):

"The difference of the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law * * * the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not enter unnecessarily."

VI.

The statement of appellant on page forty-six of his brief that the meaning of the phrase in Section 1866 of the Revised Statutes of the United States has been determined by this court in the case of *Ferris* v. *Higley* (20 Wall. 375) is based upon a misapprehension so strange that it is almost incredible. It would seem that the most superficial glance at the official report of that case where the acts of Congress involved are fully set out before the opinion would show that an entirely different act of Congress was under construction. The act there considered was an act passed by Congress on September 9, 1850 (9 Stat. at Large, 453): "To establish a territorial government for Utah." A part of section 9 of the Act is quoted in the official report, as follows: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law." "SHALL BE AS LIMITED BY LAW." The part which we have written in capitals is also in capitals in the official report of *Ferris* v. *Higley*. Appellant appears to have confused this statute so conspicuously placarded before him with Section 1866, R. S., U. S., which provides that the jurisdiction of the Territorial courts "shall be limited by law." The word "as" is a small word, but its use or omission makes so great a difference in the effect of the law that we are astonished that appellant's counsel should have overlooked it.

"Shall be as limited by law," of course, refers to the law as it existed when the Act was passed, but "shall be limited by law" cannot mean that. It is a command to somebody to limit the jurisdiction of the courts by law. A command to whom? Not to Congress, for a command by Congress addressed to itself would be superfluous and it would have been simpler to insert the limitations in the Act then being passed than for Congress to command itself to make such limitations thereafter. It cannot be addressed to any other than that legislative power which by the same chapter Congress has declared "shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." This is a grant of power to the legislature, and not a restriction upon its power. It is more. It is a command to the legislature to pass laws limiting the jurisdiction, both appellate and original, of the territorial courts. It is in obedience to that command that the legislature has passed paragraph 842. The distinction between section 1866 and language similar to that in the Organic Act of Utah is considered and demonstrated in *Greeley* v. *Winsor* (48 N. W. 214). But, even if the language of 1866 were the same as that passed on in *Ferris* v. *Higley*, it would have no bearing on this case. While, in one sense, the question involved in this case is one of jurisdiction of the trial court, that is, its jurisdiction to entertain a motion for a new trial after the expiration of the term, yet, in its essence, it is not a case of jurisdiction in the sense in which that word is used in *Ferris* v. *Higley*, but a case of practice. The statutes in question do not attempt to limit the jurisdiction of the courts, so far as the subject-matter which may be brought before them for determination is concerned, but only to prescribe the times and conditions under which that jurisdiction shall be exer-

cised. As was said by this court in *Bent* v. *Thompson* (138 U. S. 114) where an appeal was made to the authority of *Ferris* v. *Higley* to support the contention that the practice and procedure of the common law touching matters of probate were in force in New Mexico: "It may be said that that case relates only to the jurisdiction and not to the practice of these courts."

"Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor and has committed to the territorial assembly full power, subject to a few specified or implied conditions of supplying all details of legislation necessary to put the system into operation even to the defining of the jurisdiction of the several courts. * * * Of course, in case of any difficulties arising out of this state of things, Congress has in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper."

Hornbuckle *v.* Toombs, 18 Wall. 648.

We confess that we are little interested in appellant's investigations into the ancient origin of the practice of granting new trials, for we think the whole subject immaterial in this case. Whether it began under the common law or under the Mosaic Code, makes no difference. Appellant has cited no authority denying the legislature power to limit or restrict the granting of new trials, nor even to abolish new trials altogether. It is not a question of jurisdiction, but of practice. "Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings."

Railway Co. *v.* Bachus, *supra.*

"If one hearing is not due process of law, doubling it cannot make it so."

Montana Co. *v.* St. Louis M. & M. Co., 152 U. S. 160.

Nor can it even be said that the lapse of the term, without a ruling on the motion, deprives the defeated party of a new trial. It deprives the trial court of the right to give it to him, but he can still go to the supreme court for it on appeal.

At the close of his brief, counsel for appellant repeats the misstatement which he made at the beginning, that the motion for a new trial was called for hearing before the end of the term at which the motion was made. It was never called for hearing until the day it was denied. Counsel is mistaken also in saying that, "According to the decision of the supreme court of the Territory, the power of the district court to itself determine the motion was limited in this case to twenty-four hours." The fact as shown by the statement of facts is that the trial court had from the 11th day of January, 1900, when the motion was filed, until the 30th day of March, 1900, in which to determine the motion.

In conclusion, we call the court's attention to the fact that paragraph 837 was passed in 1887, and has been in force for sixteen years. Paragraph 842, as amended in 1891, has been in force for more than twelve years. Paragraph 837 came into the code of Arizona clothed with judicial interpretations already thirty-five years old, yet no act of Congress has been passed disapproving or annulling it, and our best argument as to the effect of that failure to annul is the quotation of the following language of this court:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the Territory to transmit to that body copies of

all laws on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Clinton *v.* Englebrecht, 13 Wall. 434.

This same paragraph was quoted in full and with approval by this court in a case appealed from Arizona.

Camon *v.* United States, 171 U. S. 277.

HEREFORD & HAZZARD,
Attys. for Appellee.

C. W. HOLCOMB,
W. C. KEEGIN,
J. H. McGOWAN,
Of Counsel.